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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 148.
EDGAR S. ALBRECHT et al., Petitioners,
v.
UNITED STATES OF AMERICA.

No. 149.
EDWARD J. LINNENBRINGER, Petitioner,
v.
UNITED STATES OF AMERICA.

No. 150.
DENNIS B. PITMAN et al., Petitioners,
v.
UNITED STATES OF AMERICA.

No. 151.
A. RAY OLIVER et al., Petitioners,
v.
UNITED STATES OF AMERICA.

No. 155.
Q. W. S. S. REALTY AND INVESTMENT COMPANY, a Corporation, Petitioner,
v.
UNITED STATES OF AMERICA.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITIONERS' BRIEF IN REPLY.

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SUMMARY OF ARGUMENT.

I.

The rule that a sovereign cannot be compelled to pay interest for a delay in making payment is not applicable to the cases at hand because (1) interest in condemnation

suits is not interest in the usual sense of the word but a device used to fix damages suffered by the landowner for the loss of the use of his property from the date of taking to the date of payment, and (2) a statute (40 U. S. C. A., Sec. 258a) did exist which imposed an obligation upon the United States to pay interest.

When the landowners entered into the contracts with the Government the Fifth Amendment to the Constitution of the United States guaranteed them just compensation for a taking of their lands by the United States, and this included damages in the form of interest for any loss of use of their lands caused by a taking before payment. The landowners did not waive this right by entering into the contracts because no language was used therein which expressly or impliedly indicated any intention on the part of the landowners to waive this valuable right. In fact, by implication it is apparent that the parties intended by the contract to fix only the fair market value of the property at the time of the taking.

II.

When the Government attempted to repudiate the contracts the landowners were presented with alternative remedies for the fixing of the fair market value of their land at the time of taking (1) by the contract or (2) by a commissioners' award or jury verdict. But resort to either of these remedies did not prevent the landowners from recovering an additional item of just compensation, i. e., damages in the form of interest for the loss of use of their property from the time of the filing of the Declarations of Taking to the time of the payment of the amounts provided for in the contracts.

III.

The constitutional right of the landowners to damages in the form of interest is confirmed by the Declaration of Taking Statute, and the Government, having resorted to that statute in bringing these condemnation proceedings and having taken the petitioners' lands by orders entered pursuant to the statute, must comply with the obligation imposed by the statute to pay interest.

ARGUMENT.

I.

Petitioners, by Entering Into the Contracts, Did Not Waive Their Right to Interest Guaranteed Them by the Fifth Amendment to the Constitution of the United States.

The Government contends that since the contracts in question contained no express stipulation on the part of the Government to pay interest in the event that the amount due the landowner for the taking of his property was not paid at the time of the taking, the Government cannot be required to pay the petitioners interest because a sovereign cannot be required to pay interest for a delayed payment in the absence of a contract or statute requiring it to do so. The petitioners freely concede that generally absent a contract or statute, the sovereign cannot be held to the payment of interest. However, that rule has no application to the cases at hand because:

1. The use of interest as a device for measuring a landowner's damages for delay in payment of the award in condemnation does not consist in the imposition of an obligation to pay **interest** in the usual sense of the word. In condemnation, interest is not interest at all but is simply an additional item of damages (just compensation) for depriving an owner of a property right, to-wit, the use of his property between the date of the taking and the date of payment.

2. A statute (40 U. S. C. A., Sec. 258a) did exist which imposed an obligation upon the United States to pay interest at six per cent per annum. This statute was employed by the United States in the proceedings when it filed Declarations of Taking and obtained title to the tracts in question (R. Oliver, et al. v.

U. S., pp. 10-14, 15-17; R., Edgar S. Albrecht et al. v. U. S., pp. 15-18, 18-20; R., Q. W. S. S. Realty & Inv. Co. v. U. S., pp. 74-78, 79-83; R., Edward J. Linnenbringer et al. v. U. S., pp. 137-139, 140-142; R., Dennis B. Pitman et al. v. U. S., pp. 216-221, 221-227).

At the time the petitioners entered into the contracts with the Government, the petitioners enjoyed a right to damages for delay in the payment of the fair market value of their property which was guaranteed them by the Fifth Amendment to the Constitution of the United States. It is a fundamental rule of contracts that the law of the place in which the contract is made becomes a part of the contract. This constitutional right of the landowners for damages for loss of use of their property by implication became a part of the contracts in question. It should be borne in mind, too, that these contracts were prepared by the Government and not by the landowners (**Muschany v. U. S.**, 324 U. S. 49, l. c. 52), so that any ambiguity in the contract should be construed against the Government and not against the landowners. Unless this constitutional right was waived by the petitioners, either expressly or by clear implication, the landowners are entitled to recover interest as part of just compensation for the taking of their property. It is well settled that a right will not be deemed waived except by some clear or unequivocal act or expression on the part of the obligee. **Public Warehouses of Matanzas, Inc., et al. v. Fidelity & Deposit Co. of Maryland**, 77 F. (2d) 831 (C. C. A. 2); **Victor Products Corp. v. Yates-American Machine Co.**, 54 F. (2d) 1062 (C. C. A. 4); **Reed v. Bankers Union of the World**, 121 Mo. App. 419, 99 S. W. 55.

In **Michigan Savings & Loan Association v. M. K. & T. Trust Co.**, 73 Mo. App. 161, the court quoted the following statement often used by the Missouri courts (73 Mo. App., l. c. 165):

> "'To make out a case of abandonment or waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to estoppel on his part.'"

It should also be observed that although generally a contract is construed in light of the intention of both parties to the instrument, the waiver of a right depends upon the intention of the obligee only. **Champion Spark Plug Co. v. Automobile Sundries Co.**, 273 F. 74 (C. C. A. 2); **Stiepel v. The German American Mutual Life Association**, 55 Mo. App. 224, where the court said (55 Mo. App., l. c. 233): "Waiver depends solely upon the intention of the party against whom it is invoked, * * *."

The Government does not contend that there is any express language in the contracts which waived the right of the landowners to damages for delay, but does say that impliedly this right was waived. The implied waiver is said to arise in this way—by the contracts the Government was given the right to possession until the Government paid for the lands, but no time was fixed for payment. From this it is argued that the delay in payment which occurred in these cases is not compensable but is only what the Government was entitled to in any event under the contracts. This is probably the controlling theory of the opinion of the Eighth Circuit Court of Appeals denying the landowners interest. **Oliver v. United States**, 155 F. (2d), l. c. 75, 76. The logical result of the opinion is that the Government could have remained in possession of the landowners' property without making payment for an indefinite period of time—not only the four years which elapsed between the filing of the Declarations of Taking and the ultimate payment of the amounts called for in the contracts, but ten, twenty, thirty years or more. Not only can the opinion of the Court of Appeals be thus reduced to absurdity, but in fact its interpretation of the contracts

is not warranted by the language of the instruments. It is true that no fixed time was provided for payment (in the event of voluntary conveyancing). The contracts merely required payment by the Government when the landowners furnished a final certificate of title showing good and marketable title vested in the United States (R., Oliver v. U. S., p. 37). But this does not mean that payment could be deferred indefinitely. It is axiomatic that where a contract provides for the doing of a thing but fixes no time within which it shall be done, it will be implied that the parties intended that the act should be performed within a reasonable time. This very rule was invoked in **United States v. Stott**, 140 F. (2d) 941 (C. C. A. 8), where the United States and landowners had entered into a contract for the acquisition of land by the former. The contract there permitted the Government to bring condemnation proceedings in the event that good title could not be acquired otherwise, but no time was fixed for the institution of such proceedings. No such action was taken for approximately a year and a half, when the landowners rescinded the contract. It was held that the contract gave the Government only a reasonable time within which to proceed, and that it had failed to act within that time. Under the contracts in the cases at hand the Government doubtless had the right to enter into possession and remain in for a reasonable time to permit execution of the contracts without being required to pay any further compensation than that fixed in the instruments. But without question, that reasonable time came to an end when the Government repudiated the contracts and brought condemnation suits in June, 1941. The bringing of these suits and their prosecution to a final judgment made the provisions of the contracts relating to voluntary conveyancing impossible of performance and certainly terminated the right of the Government to remain in possession pursuant to the contracts. In fact, the Government obtained

immediate possession of the tracts in question at the time of filing the condemnation proceedings by orders entered pursuant to the Declarations of Taking (R., Oliver et al. v. U. S., p. 17; R., Albrecht et al. v. U. S., p. 20; R., Q. W. S. S. Realty & Inv. Co. v. U. S., p. 83; R., Edward J. Linnenbringer et al. v. U. S., p. 142; R., Dennis B. Pitman et al. v. U. S., p. 227). After the filing of the condemnation proceedings the Government clearly held possession by virtue of the orders entered pursuant to the Declarations of Taking, and not by reason of the contracts.

If any implication with reference to the payment of interest can be drawn from the contracts, it is that the Government was required to make such payment. Suppose that the Government had instituted condemnation proceedings pursuant to the terms of the contracts for the purpose of clearing title not approved by the Attorney General, but had failed to pay into court the amounts called for by the contracts. Would the Government have been required to pay interest? Here, according to the contracts (R., Oliver v. U. S., p. 37), the Government was obliged to—

> "• • • proceed to acquire the land by condemnation proceedings • • • **under a consent verdict fixing the award at the agreed valuation** • • • and will upon filing its petition in such proceedings deposit said agreed purchase price with the Clerk of said Court, • • •." (Emphasis ours.)

By this paragraph a "consent verdict" would have been entered in the Oliver case "fixing the award" at $70,000. The "verdict" of a jury in a condemnation case or an "award" can only fix the market value of the property at the time of taking and the interest is computed by the Court in its judgment entered upon the verdict. This is so because in condemnation proceedings payment frequently is not made until after the jury verdict or commis-

sioners' award, so that the period during which interest runs can be known only to the Court. **Reed v. C. M. & St. P. Ry. Co.**, 25 F. 886 (C. C., N. D. Iowa, E. D.). See also **Weisner Valley Land & Water Co. v. Ryan**, 190 F. 417 (C. C. A. 9). Thus it is quite evident from the express language employed in the contract that interest would have been allowed in the Oliver case from the filing of the Declaration of Taking to the final payment of the deficiency upon the difference between the $70,000 called for by the contract and the $21,500 paid into Court at the time of the Declaration of Taking. It is submitted that the Government, by breaching its contracts and filing condemnation suits, should not be permitted to benefit by its wrongdoing by being absolved of the obligation to pay interest.

It is submitted that **Danforth v. United States**, 308 U. S. 271, is helpful to the solution of the cases at hand. There after a contract had been entered into fixing the value of a flowage easement and providing for the bringing of condemnation proceedings to acquire title to the easement, the Government, as in these cases, attempted to repudiate the contract and brought condemnation proceedings to acquire the land, insisting that the fair market value should be fixed by commissioners. In considering the liability of the Government for the additional item of damages in the form of interest this Court discussed at considerable length the question of whether a taking had occurred before payment and finally denied interest because no prior taking had occurred. It is evident that if this Court had believed that the landowners had waived their right to interest by entering into the contract it would have said so, thus obviating the necessity of ruling the question of whether a prior taking had occurred. This case is authority for the proposition that the contract there fixed only the fair market value of the easement at the time of taking. It will be observed that the lan-

guage of this contract (Par. 3, 308 U. S., l. c. 279) bears a close resemblance to the language found in the paragraph providing for the bringing of condemnation proceedings in the contracts now in question (R., Oliver et al. v. U. S., p. 37). Both contracts use the words "verdict" and one employs "awarded" and the other "award." Such language can only refer to methods of establishing the fair market value of property at the time of taking, which would not include the additional item of damages in the form of interest. Upon the authority of **Danforth v. U. S.**, the contracts in question did no more than to fix the fair market value at taking, and did not include damages for loss of use of the lands subsequent to the taking.

II.

The Obligation of the United States to Pay Interest as Part of "Just Compensation" Is Not Inconsistent With the Government's Obligation to Pay the Fair Market Value at the Time of Taking Fixed by the Contracts.

The Government contends that when it repudiated the contracts in question the petitioners were presented with a choice of two courses of action—the first, to insist upon receiving the prices fixed in the contracts; the second, to acquiesce in the Government's attempted repudiation of the contracts and to receive the "just compensation" guaranteed by the Constitution (Government's Brief, p. 23). It is respectfully submitted that this statement constitutes a confusion of substantive rights with procedural rights. Under no circumstances were the landowners entitled to more than just compensation. This was a substantive right arising from the taking of their lands. When the Government breached the contracts the landowners were presented with a choice of **remedies** as to the manner in which the fair market value of their property should be established: (1) by contract or (2) by a commissioners' award

or a jury verdict. But in either case the landowners, not having waived their right to interest by the contracts, were entitled to additional damages for the loss of use of their property from the date of the filing of the Declarations of taking to the date of payment of the fair market value of the lands. The landowners elected to have the fair market value of their lands fixed by contract, but this did not in any wise affect their right to such additional damages.

III.

The Declaration of Taking Act Confirms the Constitutional Right of the Landowners to Interest as Damages for Loss of Use of Their Property.

It is true that the Declaration of Taking Statute (40 U. S. C. A., Sec. 258a) merely codified the case law construction of "just compensation" guaranteed by the Fifth Amendment to the Constitution by requiring the payment of interest as a part of just compensation where the taking preceded payment. Since the landowners did not waive their right to interest by entering into the contracts, their constitutional right to interest as an additional item of compensation is simply confirmed by the Declaration of Taking Statute. The Government brought the proceedings in question pursuant to that statute. It took title and possession by orders entered pursuant to the Declarations of Taking. Although the Government argues in its brief that there was no "taking" pursuant to the Declarations of Taking because the landowners had previously conveyed their lands to the Government (Government's Brief, pp. 38-39), counsel for the Government admitted during the argument that the Government probably would claim title to the lands in question through the orders entered pursuant to the Declarations of Taking rather than through any prior deeds. This admission is amply confirmed by the judgments entered in these cases which recite:

"* * * upon the filing of said Declaration of Taking, the fee simple title to said tract of land therein described and herein described became vested in the United States of America, * * *."

(R., Oliver et al. v. U. S., p. 49; R., Albrecht et al. v. U. S., p. 40; R., Q. W. S. S. Realty & Inv. Co. v. U. S., p. 106; R., Edward J. Linnenbringer et al. v. U. S., p. 182; R., Dennis B. Pitman et al. v. U. S., p. 270).

Moreover, in some of the cases, as in Oliver v. United States, no instrument of conveyance was ever executed. And as we have heretofore said, the Government's right to possession for a reasonable time to permit the execution of the contracts terminated with the filing of the condemnation suits. Takings did occur pursuant to the Declarations of Taking and, having enjoyed the benefits of the Act, the Government is in no position to deny the obligations arising therefrom, i. e., the duty to pay interest at the rate of 6% per annum from the filing of the Declarations of Taking to the payment of the deficiencies upon the difference between the amount called for in the contracts and the amount paid into court pursuant to the Declarations of Taking.

In **United States v. Katz Drug Co.**, 150 F. (2d) 681 (C. C. A. 8), the Government brought condemnation proceedings against the defendant to obtain possession of premises held under a lease by Katz. The lease expired on June 30, 1943, and Katz was awarded the fair market value of the possession of the property to that date, although a mortgage on the property was foreclosed prior thereto on January 22, 1943, for the reason that the trial court found that Katz was prepared to prevent the foreclosure by a purchase of the mortgage if no condemnation suit had been filed. Consistent with this finding, the trial court refused to award the owner of the property any compensation for the period from January 22, 1943, to June 30, 1943, and the

United States paid the owner the amount awarded by the trial court. On appeal the United States contended that Katz was not entitled to compensation for possession from January 22 to June 30, 1943, and that if anyone was, it was the owner. The Eighth Circuit Court of Appeals refused to permit the Government to take this inconsistent position, saying (150 F. [2d], l. c. 686):

> "* * * the United States will therefore not be permitted to accept the benefit of that ruling for the purpose of making payment of compensation to the property owners, and at the same time deny its validity for the counter-purpose of escaping payment of complementary compensation to Katz."

The doctrine of this case is squarely applicable to the one at hand. Having invoked the Declaration of Taking statute and enjoyed the benefits thereof, the Government should not be permitted to escape the obligation of the statute to pay just compensation in the form of interest for the use of the land between the filing of the Declarations of Taking and the payment of the deficiencies.

CONCLUSION.

It is respectfully submitted that the judgments of the Circuit Court of Appeals should be reversed.

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